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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 280

RAY B. WELLS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of the Canal Zone rendered no opinion. The opinion of the Court of Appeals (Pet. 7-11) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1954. (Pet. 7.) The petition for a writ of certiorari was filed on August 13, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the United States District Court for the District of the Canal Zone has jurisdiction to entertain a suit against the United States for the recovery of income taxes alleged to have been erroneously or illegally assessed or collected.

STATUTES INVOLVED

The statutes involved, Canal Zone Code, Title 7, Section 23; Internal Revenue Code of 1939, Section 251; and 28 U.S.C., Sections 451, 1331, 1346, 1402, are set forth in the Appendix, *infra,* pp. 6-10.

STATEMENT

This action was brought against the United States and others in the United States District Court for the District of the Canal Zone by taxpayer Wells for himself and 1,500 others, citizens of the United States employed by it in the Canal Zone, to recover sums deducted as federal income taxes from their salaries for the calendar year 1951 (R. 1-2), on the ground that the taxes were illegally assessed and collected (R. 2-8).[1]

Jurisdiction in the United States District Court for the District of the Canal Zone is alleged in the complaint (R. 2) to be expressed and implied in 28 U.S.C., Sections 1346 and 1402, and in the Canal Zone Code, Title 7, Section 23 (Appendix, *infra,*

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[1] Taxpayers asserted in the complaint that Section 251(j) of the Internal Revenue Code of 1939 (added by Section 220 of the Revenue Act of 1950, c. 994, 64 Stat. 906, 944, Appendix *infra,* pp. 7-8), under which the tax was imposed, is "beyond the taxing power of the Congress" (R. 4).

pp. 6, 9-10). In this Court, however, taxpayers state "Only one statute is involved in this question of jurisdiction Title 7, section 23 of the Canal Zone Code * * *". (Pet. 4.)

The United States demurred to the complaint on the ground, among others, that the trial court lacked jurisdiction over the United States because the United States had not given its permission to be sued (R. 13, Pet. 8). The trial court sustained the demurrer and dismissed the complaint as to the United States (R. 15-16). The court of appeals affirmed (Pet. 7-11).

ARGUMENT

The decision of the court below holding that the trial court had no jurisdiction of a suit brought against the United States to recover a tax refund, is based upon a principle of law that is well settled by numerous decisions of this Court, and further review is not warranted.

Without specific statutory consent no suit may be brought against the United States. *Louisiana* v. *McAdoo,* 234 U. S. 627; *Minnesota* v. *United States,* 305 U. S. 382; *United States* v. *Shaw,* 309 U. S. 495; *United States* v. *Sherwood,* 312 U. S. 584; *Compagnie Generale T.* v. *Governor of the Panama Canal,* 90 F. 2d 225 (C. A. 5th), certiorari denied, 302 U. S. 720. Waivers of sovereign immunity are strictly construed (*United States* v. *Sherwood, supra,* p. 590); and it rests with Congress not only to determine whether the United States may be

sued but also in what courts. ***Minnesota*** v. *United States, supra,* p. 388. As held by the court below (Pet. 9-11), taxpayers have failed to show that Congress has ever expressed its consent to suit against the United States in the United States District Court for the District of the Canal Zone for refund of internal revenue taxes erroneously or illegally collected. Certainly, Canal Zone Code,[2] Title 7, Section 23(g), conferring jurisdiction on that court of "All actions and proceedings involving laws of the United States applicable to the Canal Zone" (Appendix, *infra,* p. 6), upon which taxpayers in this Court place sole reliance (Pet. 4), expresses no consent to suit against the United States. This subsection merely affords that court jurisdiction to decide "federal" questions, analogous to the jurisdiction granted district courts by 28 U.S.C., Section 1331. (Appendix, *infra,* pp. 8-9.)

On the other hand, in 28 U.S.C., Section 1346 (a) (Appendix, *infra,* p. 9), Congress specifically consented to jurisdiction in the district courts, concurrent with the Court of Claims, of civil actions against the United States for recovery of internal revenue taxes alleged to have been erroneously or illegally assessed or collected, and in Section 451 (Appendix, *infra,* p. 8) defined "district court" as meaning the courts constituted by chapter 5 of the same title, thus excluding the United States District Court for the District of the Canal Zone. Indeed, when Congress intended any provision of

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[2] Adopted by Act of June 19, 1934, c. 667, 48 Stat. 1122.

Title 28 to apply to that court, it is named specifically, as where, in addition to the district courts, consent is expressed to jurisdiction in the United States District Court for the District of the Canal Zone of civil actions on tort claims against the United States. Section 1346 (b). (Appendix, *infra*, pp. 9-10.) See also 28 U.S.C., Sections 460, 610, 1252, 1291, 1292, 1294.[3]

CONCLUSION

The decision of the court below is clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1954.

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[3] Taxpayers in the Canal Zone are not without recourse; they may sue the United States in the Court of Claims (28 U.S.C., Section 1491), or the Collector to whom the taxes were paid in the appropriate forum (28 U.S.C., Section 1340; *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373).

Canal Zone Code, Title 7:

23. *Jurisdiction of district court, in general.*—The district court shall have jurisdiction of:

a. All criminal actions wherein punishment that may be imposed exceeds a fine of $100 or thirty days' imprisonment or both;

b. All cases in equity;

c. All cases in admiralty;

d. All actions for divorce and annulment of marriage;

e. All actions at law involving principal sums exceeding $500;

f. All appeals from judgments rendered in the magistrates' courts;

g. All actions and proceedings involving laws of the United States applicable to the Canal Zone; and

h. All other matters and proceedings wherein jurisdiction is conferred by the codes of law and procedure of the Canal Zone. (Aug. 24, 1912, ch. 390, sec. 8, 37 Stat. 565; Sept. 21, 1922, ch. 370, Sec. 2, 42 Stat. 1005; Feb. 16, 1933, ch. 91, sec. 2, 47 Stat. 815 [U. S. Code, title 48, sec. 1345].)

Internal Revenue Code of 1939:

SEC. 251. INCOME FROM SOURCES WITHIN POSSESSIONS OF UNITED STATES.

(a) *General Rule.*—In the case of citizens of the United States or domestic corporations,

satisfying the following conditions, gross income means only gross income from sources within the United States—

(1) If 80 per centum or more of the gross income of such citizen or domestic corporation (computed without the benefit of this section), for the three-year period immediately preceding the close of the taxable year (or for such part of such period immediately preceding the close of such taxable year as may be applicable) was derived from sources within a possession of the United States; and

(2) If, in the case of such corporation, 50 per centum or more of its gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States; or

(3) If, in the case of such citizen, 50 per centum or more of his gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States either on his own account or as an employee or agent of another.

* * * * *

(j) [as added by Sec. 220 of the Revenue Act of 1950, c. 994, 64 Stat. 906] *Employees of*

United States.—For the purposes of this section, amounts paid for services performed by a citizen of the United States as an employee of the United States or any agency thereof shall be deemed to be derived from sources within the United States.

(26 U.S.C. 1952 ed., Sec. 251.)

28 U.S.C.:

SEC. 451. *Definitions.*

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the district courts of the United States for the districts of Hawaii and Puerto Rico, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this title.

* * * * *

SEC. 1331. *Federal question; amount in controversy.*

The district courts shall have original jurisdiction of all civil actions wherein the matter

in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

* * * * *

SEC. 1346 [as amended by the Act of April 25, 1949, c. 92, 63 Stat. 62, Sec. 2; and the Act of May 24, 1949, c. 139, 63 Stat. 89, Sec. 80]. *United States as defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws, (i) if the claim does not exceed $10,000 or (ii) even if the claim exceeds $10,000 if the collector of internal revenue by whom such tax, penalty or sum was collected is dead or is not in office as collector of internal revenue when such action is commenced;

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska,

the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

SEC. 1402. *United States as defendant.*

(a) Any civil action against the United States under subsection (a) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides.

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